QUINAULT INDIAN NATION
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-84-A Decided September 18, 1998

Appeal from the disapproval of a portion of a proposed expenditure plan for forest management deductions.

Affirmed.

1. Indians: Timber Resources: Generally

The definition of "forest land management activities" in the National Indian Forest Resources Management Act, 25 U.S.C. § 3103(4) (1994), does not explicitly include "construction of office buildings." Neither does such an expenditure fall into one of the other "classes" of uses for forest management deductions authorized by the statute.

2. Indians: Timber Resources: Generally

At the very least, the Secretary of the Interior or his authorized representative has the authority to disapprove in whole or in part a tribe's proposed plan for the expenditure of forest management deductions, if the proposed expenditures are not authorized under the National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (1994).

3. Administrative Authority: Generally--Bureau of Indian Affairs: Generally--Indians: Generally--Statutory Construction: Administrative Construction

In order to correct prior error, an official of the Bureau of Indian Affairs may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

APPEARANCES: LynDee Wells, Esq., Seattle, Washington, for Appellant; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Quinault Indian Nation seeks review of a March 2, 1998, decision issued by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA). The Area Director denied that portion of Appellant's proposed Fiscal Year 1998 (FY98) Forest Management Deduction Expenditure Plan (Plan) which proposed to use an estimated $900,000 to cover the construction costs of that part of a Tribal Natural Resources building which would house Appellant's forestry personnel. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Area Director's decision.

Expedited Consideration

Appellant requested expedited consideration of this appeal. In its Statement of Reasons, Appellant indicated that two problems might result from the fact that work had been halted on that portion of the building which it had proposed to finance under its FY98 Plan. First, Appellant stated that new employees scheduled to begin work on October 1, 1998, might have to be housed in its existing, but inadequate, space. Second, Appellant asserted that it might be subject to delay penalties imposed by its contractor.

The Area Director concurred in the request for expedited consideration, but for the reason that "[t]he legal issues pending this Board's decision are matters of first impression with immediate, nationwide consequences as to the expenditure of forest management deductions." June 2, 1998, Letter Transmitting Area Director's Answer Brief.

Expedited consideration is granted.

Background

Since 1920, "forest management deductions" (FMD) have been authorized by 25 U.S.C. § 413 (1994), 1/ which provides:

> The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: Provided, That the amounts

1/ Unless otherwise indicated, all further citations to the United States Code are to the 1994 edition.

so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds.

The National Indian Forest Resources Management Act (NIFRMA), Pub.L. No. 101-630, 104 Stat. 4532, 25 U.S.C. §§ 3101-3120, was enacted in 1990. 25 U.S.C. § 3105(a) continues to authorize the withholding of FMD. In 25 U.S.C. § 3105(c), Congress specified how FMD funds were to be expended:

> The full amount of any deduction collected by the Secretary shall be expended according to an approved expenditure plan, approved by the Secretary and the appropriate Indian tribe, for the performance of forest land management activities on the reservation from which such deductions are collected and shall be made available to the tribe, upon its request, by contract or agreement for the performance of such activities.

25 U.S.C. § 3103(4) provides:

> "forest land management activities" means all activities performed in the management of Indian forest lands, including--
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> (A) all aspects of program administration and executive direction such as--
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> (i) development and maintenance of policy and operational procedures, program oversight, and evaluation,
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> (ii) securing of legal assistance and handling of legal matters,
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> (iii) budget, finance, and personnel management, and
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> (iv) development and maintenance of necessary data bases and program reports;
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> (B) all aspects of the development, preparation and revision of forest inventory and management plans, including aerial photography, mapping, field management inventories and re-inventories, inventory analysis, growth studies, allowable annual cut calculations, environmental assessment, and forest history, consistent with and reflective of tribal integrated resource management plans;
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> (C) forest land development, including forestation, thinning, tree improvement activities, and the use of silvicultural treatments to restore or increase growth and yield to the full productive capacity of the forest environment;

(D) protection against losses from wildfire, including acquisition and maintenance of fire fighting equipment and fire detection systems, construction of firebreaks, hazard reduction, prescribed burning, and the development of cooperative wildfire management agreements;

(E) protection against insects and disease, including--

(i) all aspects of detection and evaluation,

(ii) preparation of project proposals containing project description, environmental assessments and statements, and cost-benefit analyses necessary to secure funding,

(iii) field suppression operations, and

(iv) reporting;

(F) assessment of damage caused by forest trespass, infestation or fire, including field examination and survey, damage appraisal, investigation assistance, and report, demand letter, and testimony preparation;

(G) all aspects of the preparation, administration, and supervision of timber sale contracts, paid and free use permits, and other Indian forest product harvest sale documents including--

(i) cruising, product marking, silvicultural prescription, appraisal and harvest supervision,

(ii) forest product marketing assistance, including evaluation of marketing and development opportunities related to Indian forest products and consultation and advice to tribes, tribal and Indian enterprises on maximization of return on forest products,

(iii) archeological, historical, environmental and other land management reviews, clearances, and analyses,

(iv) advertising, executing, and supervising contracts,

(v) marking and scaling of timber, and

(vi) collecting, recording and distributing receipts from sales;

(H) provision of financial assistance for the education of Indians enrolled in accredited programs of postsecondary and postgraduate forestry and forestry-

related fields of study, including the provision of scholarships, internships, relocation assistance, and other forms of assistance to cover educational expenses;

(I) participation in the development and implementation of tribal integrated resource management plans, including activities to coordinate current and future multiple uses of Indian forest lands;

(J) improvement and maintenance of extended season primary and secondary Indian forest land road systems; and

(K) research activities to improve the basis for determining appropriate management measures to apply to Indian forest lands. [2/]

Although evidence of this fact is not included in the materials before the Board, Appellant has apparently been receiving FMD funds. According to Appellant, as of October 1, 1997, its FMD account had a balance of over $4.2 million, of which at least $2.7 million was derived from sales of timber from lands held in trust for it. Presumably, the remaining $1.5 million was derived from sales of timber from allotted lands.

In accordance with 25 U.S.C. § 3105(c), on November 5, 1997, Appellant submitted its proposed FY98 Plan to the Superintendent, Olympic Peninsula Agency, BIA (Superintendent). The Plan called for expending $2,023,200 for a variety of activities. Section II, B of the Plan, which addressed Natural Resources Management, included the following proposed expenditure for Forestland Management:

During FY98 a new Natural Resources Office Facility is being constructed adjacent to [Appellant's] Administrative Office Building. This facility will house all existing Natural Resources (QDNR) Staff as well as staff that will be hired upon compacting the remaining BIA Forestry and Realty Programs. Presently, the QDNR staff is occupying three modular buildings. These buildings are inadequately heated by portable heaters; the buildings have leaky roofs in a region where rainfall is 70 to 90 inches per year; and there is only limited space for present staffing and no space for the addition of 20-25 new staff positions for the remaining BIA Forestry and Realty Programs. As a majority of this complex will support Forestland Management Staff, partial funding of its

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2/ Regulations implementing the NIFRMA were published at 60 Fed. Reg. 52260 (Oct. 5, 1995), and are found in 25 C.F.R. Part 163. The statutory definition of "forest land management activities" is repeated virtually verbatim in 25 C.F.R. § 163.1. 25 C.F.R. § 163.25(f) provides in pertinent part that "[f]orest management deductions are to be utilized to perform forest land management activities in accordance with an approved expenditure plan."

> construction is requested to be funded from this budget. We estimate that the FMD share of the building will be $900,000.00.

Appellant's FY98 Plan, at 6.

On November 14, 1997, the Superintendent approved Appellant's FY98 Plan except for the proposed expenditure of $900,000 for part of the construction costs of the office building. In support of his decision, the Superintendent cited the NIFRMA, the regulations in 25 C.F.R. Part 163 and specifically 25 C.F.R. §§ 163.1 and 163.25, and 53 BIAM (Bureau of Indian Affairs Manual) Supplement 3, 6.6F.

Appellant appealed to the Area Director who, on March 2, 1998, upheld the Superintendent's decision.

Appellant then appealed to the Board. 3/ Appellant and the Area Director filed briefs.

Discussion and Conclusions

The only question raised in this appeal is whether FMD funds may be expended for the construction of an office building to be used for purposes related to forest management.

Appellant first argues that the NIFRMA unambiguously allows its proposed expenditure, and that the legislative history and canons of statutory construction support its interpretation of the NIFRMA.

"The starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). See also Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978); and cases cited therein; Johns-Manville Corp. v. United States, 855 F.2d 1556, 1559 (Fed. Cir. 1988). Here, "construction of office buildings" is clearly not listed in 25 U.S.C. § 3103(4) as a "forest land management activity." Therefore, the explicit language of the statute does not support Appellant's argument that the NIFRMA unambiguously authorizes its proposed use of FMD funds.

Appellant attempts to support its argument through reference to various canons of statutory construction. Citing several cases, including Puerto Rico Maritime Shipping Authority v. ICC, 645 F.2d 1102 (1981), Appellant argues that Congress' use of the words "including" and "such as" in 25 U.S.C. § 3103(4) indicates that it intended the enumerated activities to be "illustrative, not exclusive." 645 F.2d at 1112 n.26. Appellant argues: "Congress did not attempt to

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3/ On Apr. 17, 1998, the Acting Assistant Secretary - Indian Affairs attempted to assume jurisdiction over this appeal under 25 C.F.R. § 2.20. In an order dated Apr. 17, 1998, the Board held that the attempt to assume jurisdiction was untimely.

limit what tribes can do [with FMD funds]; as long as the activity is reasonably related to forest management--which constructing office space for forestry management and technical personnel most certainly is--Congress intended the funds to be put to that use." Appellant's Statement of Reasons at 7.

Appellant also quotes three passages from S. Rep. No. 402, 101st Cong., 2d Sess. (1990) (S. Rep. 402; Report), in support of this argument. It first quotes from page 9 of the Report: "The Committee amendment lists specific forest management functions and activities for the management of Indian forest resources. The Committee believes that such detail is necessary to maintain the accountability necessary to fulfill the trust responsibility for the management of Indian forests." Appellant also quotes from page 8 of the Report: "The Committee has adopted a broad definition of forest land management activities because it intends to promote state-of-the art management which yields optimal returns to the tribes." Finally, Appellant quotes a comment from page 13 of the Report which it describes as "particularly telling": "Virtually all of the problems identified by the Committee during its deliberations on [the bill] lend themselves most readily to solutions which involve the development of increased tribal management capability."

Appellant argues that "[i]n order to provide the state-of-the-art management envisioned by Congress * * *, [Appellant] must provide adequate office facilities for its forest management staff." Appellant's Statement of Reasons at 8.

Citing the same passage from page 9 of S. Rep. 402 as Appellant (i.e., "The Committee believes such detail is necessary to maintain the accountability necessary to fulfill the trust responsibility for the management of Indian forests"), the Area Director responds that Congress' unusually detailed and specific listing of "forest land management activities" was intended to provide accountability in the expenditure of FMD funds and to clarify prior misunderstandings about the allowable uses of those funds. He argues that the NIFRMA authorizes the expenditure of FMD funds only for "on-the-ground forest management actions." Area Director's Answer Brief at 6.

Section 3103(4) provides that "forest land management activities means all activities performed in the management of Indian forest lands, including * * *" (emphasis added). In Colautti v. Franklin, 439 U.S. 379, 392 n.10 (1979), the Supreme Court cited with approval 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978), which, as quoted by the Court, states that "'[a] definition which declares what a term "means" . . . excludes any meaning that is not stated.'" See also Johns-Manville, 855 F.2d at 1559. Appellant does not discuss the implication of the use of the word "means" in section 3103(4).

An examination of section 3103(4) reveals that it uses the word "including" in introducing eleven major categories of "forest land management activities." Subsections (4)(B) through (I) each use the word "including" before providing a further breakdown or explanation of a major category, while subsection (4)(A) uses the phrase "such as" in the same manner. Subsections (4)(J) and (K) do not involve a further breakdown of a major category and do not contain

either "including" or "such as." Each of the eleven major categories of authorized "forest land management activities" is quite specific.

In light of Congress' very careful and specific listing of the "forest land management activities" which could be funded with FMD monies, and in the absence of any clear language indicating that other types of activities might be included, it is difficult to conclude that Congress intended to authorize the use of FMD funds for purposes other than those clearly falling within the categories listed. In the context of section 3103(4), it appears most likely that the word "including" was used to indicate that "forest land management activities," as defined by Congress, "included" more than one type of activity, and that the types of activities "included" were listed. The same reasoning appears to apply to the phrase "such as," which appears in subsection 3103(4)(A) and which is followed by four types of activities which constitute "program administration and executive direction."

This interpretation of section 3103(4) is strengthened by the legislative history. Senate Rep. 402 states at page 8:

> In light of the testimony received by the Committee regarding the lack of clarity in the existing forest management programs, the Committee amendment contains extensive definitions intended to clearly delineate the scope of the bill, its applicability and the management activities which are required to be performed. It is the Committee's expectation that by providing this level of detail, federal and tribal officials will have the framework necessary for the sustained yield management of Indian forest resources pursuant to fully developed and approved forest management plans and integrated resource management plans.

The Report continues on page 9 with the passage relied on by both Appellant and the Area Director:

> The Committee amendment lists specific forest management functions and activities for the management of Indian forest resources. The Committee believes such detail is necessary to maintain the accountability necessary to fulfill the trust responsibility for the management of Indian forests. In the past, the absence of such specificity has led to poor management, confusion, ill-will, and litigation.

On page 10 the Report states that "[n]o aspect of the Secretary's forestry program has been the subject of greater controversy and confusion [than FMD]. * * * The Committee amendment is intended to provide the Secretary and the tribes with clear direction for the collection and use of the 'forest management deduction.'" And on page 11 it states: "Expenditures of deducted funds can only be made in accordance with a plan developed by the tribal reservation's recognized

government and approved by the Secretary. Funds derived from the management deduction must be expended for forest management activities."

The Supreme Court has held that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1979). See also Neuberger v. Commissioner, 311 U.S. 83, 88 (1940); Johns-Manville, 855 F.2d at 1559. Here, to the extent that the use of the word "including" at the beginning of the definition of "forest land management activities" might be construed as authorizing the use of FMD funds for activities other than those listed, that construction is contradicted by both the remainder of the section and the legislative history.

Appellant has not attempted to show that its proposed use of FMD funds falls into one of the eleven groups or "classes" of activities listed in section 3103(4). The Board's independent analysis convinces it that "construction of office buildings" is not even remotely related to any of the types of activities listed in the NIFRMA.

Turning to a different canon of construction, Appellant cites Elliot Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 17 F.3d 616, 631 (3rd Cir. 1994), in arguing that "the mischief rule" directs the person interpreting a statute to look to the "mischief and defect" that the statute was intended to cure. It contends that the "mischief" here "was the abusive use of FMD funds for projects wholly unrelated to forestry and often even on other reservations." Appellant's Statement of Reasons at 7. It continues: "The contrast in this instance is clear: [Appellant] proposes to use funds deducted from revenues it would otherwise have received directly from the purchaser of its timber resource for a project necessary to its efforts to manage its forests well." Id.

The Board finds that Appellant's "mischief rule" argument is based on an incomplete statement of the "mischief and defect" which the NIFRMA was intended to cure. As discussed above, both the NIFRMA and its legislative history show that Congress also sought to end the confusion that had previously existed as to the purposes for which FMD funds could be used. Because Congress specifically intended to address the question of the ways in which FMD funds could be used, Elliot Coal actually supports the Area Director's, rather than Appellant's, position in this case.

Appellant also cites Bryan v. Itasca County, 426 U.S. 373, 392 (1976), in support of an argument that the special canons of construction governing the interpretation of Indian legislation require that any ambiguity in the statute be resolved in its favor. Bryan cites several earlier Supreme Court cases, including Choate v. Trapp, 224 U.S. 665, 675 (1912), which states:

> [I]n the Government's dealings with the Indians * * * the construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people,

> who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years * * *.

The Board has frequently cited the special canon of construction applicable to Indian legislation. See, e.g., ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, 23 IBIA 228, 234 (1993); Dahlstrom Lumber Co. v. Portland Area Director, 20 IBIA 143, 153 (1991). However, as the Supreme Court has stated, "'[t]he canon of construction regarding the resolution of ambiguities [in favor of the Indians] . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.'" Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 555 (1987), quoting from South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986). The Board has never held that this canon requires it to accept an interpretation of a statute for which there is otherwise no support in the statute or the legislative history--and which is, in fact, contrary to the evidence in the statute and the legislative history--merely because that interpretation is advanced by an Indian tribe. Neither has Appellant cited any court case making such a holding.

[1] The Board concludes that the proper construction of 25 U.S.C. § 3103(4) is that the section lists all of the types of activities for which Congress intended to authorize the use of FMD funds. Because "construction of office buildings" is not explicitly listed in section 3103(4) and is not reasonably construed as falling into any of the categories of activities listed in the section, the Board concludes that the NIFRMA does not authorize the use of FMD funds for "construction of office buildings." 4/

Appellant raises two arguments challenging BIA's authority to disapprove its proposed expenditure. One argument emphasizes a portion of 25 U.S.C. § 3105(c); namely, "The full

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4/ The Area Director's decision stated at page 3 that the NIFRMA "reflected sweeping changes in Indian forest management. These changes include the collection, planning, expending and reporting requirements for the use of" FMD funds. The Area Director devoted a great deal of his Answer Brief to a discussion of the source of the language used in the definition of "forest land management activities" in sec. 3103(4). He contends that the language was actually taken directly from Departmental regulations and BIAM provisions dating back at least to 1939: "Thus, the NIFRMA did not innovate and develop new legal parameters guiding utilization of FMD's--it adopted and codified existing Secretarial policy and practice, including the specific expenditure guidelines used for nearly 30 years." Area Director's Answer Brief at 6. In its Reply Brief, Appellant attacks the apparent inconsistency of these two statements.

Although this dialog might provide an interesting historical footnote to a treatise on the NIFRMA, the Board finds it essentially irrelevant to its construction of the statute. The source of the specific language used in the statute is less important than Congress' stated opinion that, whatever language had been used in the past, there was confusion and uncertainty in the Department's administration of the forestry program, including the ways in which FMD funds could be used.

amount of any deduction collected by the Secretary * * * shall be made available to the tribe, upon its request." This argument appears to be that the only limitation on a tribe's right to receive the full amount of FMD funds collected from its reservation is that the tribe must ask for the funds.

Appellant's second argument is that BIA has very limited authority to disapprove expenditure plans. Although conceding that BIA would have the authority and the responsibility to "question" a proposed expenditure that was "wholly unrelated to forest management" (Appellant's Statement of Reasons at 9 and 10), Appellant argues that BIA lacks authority to disapprove a plan that is in any way related to forest management, because the NIFRMA authorizes tribes to set their own priorities for the use of FMD funds. Appellant contends that once a tribe has set its priorities, BIA's role is limited to the "ministerial" task of approving the expenditure and disbursing the funds. Id. at 9. 5/

The Board finds that these arguments are not supported by the language of NIFRMA, which specifically preserves both the Federal trust responsibility over Indian forest lands and the Secretary's involvement in the management of those lands. 25 U.S.C. § 3101(2) provides that "the United States has a trust responsibility toward Indian forest lands." 25 U.S.C. § 3120 states: "Nothing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands, or any legal obligation or remedy resulting therefrom." 25 U.S.C. § 3102(1) states that enactment of the NIFRMA was intended, inter alia, to "allow the Secretary * * * to take part in the management of Indian forest lands, with the participation of the lands' beneficial owners, in a manner consistent with the Secretary's trust responsibility and with the objectives of the beneficial owners." Thus Congress clearly set forth its intent that the Secretary was to continue to participate as a trustee in the management of Indian forest lands under the NIFRMA. Appellant's limited reading of 25 U.S.C. § 3105(c) and its contention that the NIFRMA gives essentially total control over FMD funds to tribes are simply at odds with the explicit language of the statute.

Assuming the statute left any room for doubt, the legislative history of the NIFRMA also makes it plain that the Secretary's involvement and trust responsibilities are preserved. Senate Rep. 402 states at page 6: "Consistent with prior Acts of Congress and the Supreme Court's decision in [United States v. Mitchell, 463 U.S. 206 (1983)], the Committee amendment finds

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5/ Much of this argument is based on Appellant's perception that the Superintendent sought to substitute his judgment for Appellant's in determining what Appellant's priorities should be. Both the Superintendent's and the Area Director's decisions are based on the law. It appears that in its Statement of Reasons Appellant was reacting to an attachment to the Superintendent's answer to Appellant's appeal to the Area Director.

In his Answer Brief before the Board, the Area Director presents a lengthy discussion of the Superintendent's exercise of discretion in disapproving Appellant's proposed expenditure. The issue of discretion is addressed in text below.

that [Indian forest resources] are a perpetually renewable and manageable resource for which the United States has a trust responsibility." It continues on page 7:

> It is the Committee's intention that tribal law should govern the management and protection of Indian forest resources to the maximum extent feasible consistent with the Secretary's trust responsibilities and the unique relationship between the Federal government and the tribes.
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> * * * * * *
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> The [NIFRMA] is intended to promote the cooperative Federal/tribal management and protection of Indian forest resources.

The Report states at page 9:

> All forest management plans should be developed with tribal participation, reflect tribal objectives for use of forest lands and be approved by the Secretary of the Interior.
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> * * * * * *
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> * * * The Committee intends that tribal objectives * * * will be accorded primary consideration in any approved management plan, to the extent feasible and consistent with the Secretary's trust responsibility. The Committee has included a definition of Indian land to ensure that the Secretary continues to manage and protect all Indian forest lands which are eligible for such services.

On page 11 the Report states that "[e]xpenditures of deducted funds can only be made in accordance with a plan developed by a tribal reservation's recognized government and approved by the Secretary."

[2] Both a tribe's right to set its own priorities as to the expenditure of FMD funds and the Secretary's authority to approve a tribe's expenditure plan end at the point where the authorizing legislation is violated. The Board concludes that, at the very least, BIA has the authority to disapprove an expenditure plan which violates the NIFRMA by proposing to use FMD funds for unauthorized purposes.

The Area Director seeks a broader statement of BIA's disapproval authority based on the Secretary's discretion in carrying out the Federal trust responsibility. Citing Brown v. United States, 86 F.3d 1554, 1560 (Fed. Cir. 1996), he argues that the trust responsibility includes "control and supervision" over the trust res--here, the forest lands--and that the Secretary has broad discretion in exercising that control and supervision.

As discussed, the NIFRMA specifically preserves the Secretary's trust responsibility. It appears likely that the trust responsibility would give the Secretary some amount of discretion in approving or disapproving proposed expenditures of FMD funds. However, because the Board finds that the issue raised in this appeal is properly decided as a question of law, not of discretion, it declines at this time to discuss the parameters of the Secretary's discretion.

Appellant also argues that the failure to allow it to use FMD funds for the construction of its office building violates the equal protection clause of the Fifth Amendment. Appellant bases this argument on its allegation that other tribes in the Portland Area were permitted to use FMD funds for building construction and/or improvement both before and after the enactment of the NIFRMA.

The ways in which tribes were permitted to use FMD funds prior to the enactment of the NIFRMA do not raise equal protection issues and are not relevant to this decision. The question is how FMD funds may be used post-NIFRMA.

The Area Director concedes that other tribes in the Portland Area have used FMD funds for building construction and/or improvement since the enactment of the NIFRMA. He states:

> Expenditures for construction and remodeling of buildings were included in a few FMD expenditure plans. Most of these expenditures of FMD for building related items were not directly identified, or were obscured within the expenditure plans. In most cases it is uncertain whether BIA knew its approval included fairly small building related expenditures. * * *
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> Of all expenditure plans reviewed by BIA, [Appellant's] expenditure is unique. It appears unprecedented in the scope of the building construction project, the amount of money involved, and in the direct assertion that 53 BIAM Supp. 3, 6.6(F)(2) authorizes the expenditure.

Area Director's Answer Brief at 11. The Area Director argues that it is likely that there will be variations in the exercise of approval authority with respect to NIFRMA expenditure plans because that authority has been delegated to BIA Agency Superintendents and because of the differing needs of individual reservations.

[3] Appellant has cited no authority for the proposition that the equal protection clause requires a Federal agency to perpetuate an interpretation of law which it has determined to be incorrect merely because others may have benefitted from the prior erroneous interpretation. Indeed, Appellant itself recognizes that a Federal agency may change an erroneous interpretation of law as long as the agency clearly explains the reason for its change in interpretation so that the change is shown not to be arbitrary or capricious. See Appellant's Statement of Reasons at 10. The Board has repeatedly and consistently held that BIA has not only the authority, but also the

responsibility, to correct an erroneous interpretation of law. See, e.g., Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169, 180 (1993), and cases cited therein. It has not hesitated to vacate or reverse BIA decisions which fail to show the reason for the change in position or interpretation of law. See, e.g., Stockbridge-Munsee Community v. Acting Minneapolis Area Director, 30 IBIA 285 (1997); Hopi Indian Tribe v. Director, Office of Trust and Economic Development, 22 IBIA 10, 16 (1992).

To the extent the Area Director's present position represents a change in BIA's interpretation of the NIFRMA, the Board concludes that the interpretation of the NIFRMA as not authorizing the use of FMD funds for the construction of an office building is correct. It further concludes that the reason for any change in interpretation has been clearly set forth. 6/

The Board believes it necessary to address one additional matter raised at page 3 of Appellant's Reply Brief. Appellant states:

> [T]he Area Director's explanation of how other tribes in the Portland Area were allowed to spend FMD funds for building construction type activities suggests that if [Appellant] simply had not listed the expenditure expressly

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6/ Appellant cited 53 BIAM Supp. 3, 6.6(F)(2) in its FY98 Plan as supporting its proposed expenditure, but did not discuss this subsection on appeal. The Board concludes that Appellant has abandoned its contention that this subsection supports its proposed expenditure. In any event, the subsection deals with "Protection from Fire" and does not support Appellant's position.

In its Reply Brief, Appellant alleges for the first time that its proposed expenditure is authorized under 53 BIAM Supp. 3, 6.6G(5) and 53 BIAM Supp. 5, Illustration 1. The Board has held that it is not required to consider arguments raised for the first time in a reply brief. See, e.g., Redneck v. Acting Billings Area Director, 31 IBIA 192, 196 (1997); Winlock Veneer Co. v. Juneau Area Director, 28 IBIA 149, 157, and cases cited therein, recon. denied, 28 IBIA 220 (1995). However, if it were to consider the arguments, the Board would reject both of them.

The current version of 3 BIAM Supp. 3 was written in 1985, five years before the enactment of the NIFRMA. Therefore, the Supplement cannot show BIA's interpretation of the NIFRMA. To the extent the Supplement is inconsistent with the NIFRMA, the later-enacted statute governs. Collins v. Acting Billings Area Director, 30 IBIA 165, 172 (1997), and cases cited therein. Furthermore, although 53 BIAM Supp. 3, 6.6(G)(5) provides that one "justifiable expense" is "rents, communications and utilities" (emphasis added), the Board takes official notice of the fact that the list of expenses in subsec. 6.6(G) is taken directly from the categories used by the Federal government in describing the types of expenses which may be incurred in the expenditure of appropriated funds. Thus, the list is not specific to the use of FMD funds.

Although 53 BIAM Supp. 5, Illustration 1, was revised in 1991, after the enactment of the NIFRMA, it deals with activities that may be undertaken with funds from a variety of sources, including, but not limited to, FMD funds. Illustration 1 requires certain reports, but does not purport to provide independent authorization for the activities and expenditures which are reported.

> in its FMD Expenditure Plan, [Appellant] would not be before the Board today. If [Appellant] had omitted or "obscured" the expenditure, it too would have "slipped through." Certainly the Area Director could not have meant to propose such a course of action.

The Board agrees with Appellant that the Area Director did not mean to propose that tribes falsify their FMD expenditure plans. The Area Director meant to explain that, in the past, BIA officials might not have anticipated that unauthorized uses of FMD funds might be buried in expenditure plans and therefore might not have been as vigilant as they could have been, and probably will be in the future.

It is certainly possible that the falsification of an FMD expenditure plan might fall under the provisions of 18 U.S.C. § 1001(a) (Supp. II, 1996), which provides in pertinent part:

> [W]hoever, in any matter within the jurisdiction of the executive * * * branch of the Government of the United States, knowingly and willfully - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's March 2, 1998, decision is affirmed.

_____
Kathryn A. Lynn
Chief Administrative Judge

I concur:

_____
Anita Vogt
Administrative Judge